No. 80-333

MICHAEL ROD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TOWN OF SOUTHAMPTON,

Appellant,

—against—

RONALD J. TROYER, DANIEL STEIN,
and LINDA CHRISTENSEN,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

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Questions Presented

1. Whether a local ordinance prohibiting door to door solicitation by all except residents of the community for more than six months is valid in a state which provides that property owners may post their respective properties against unwanted solicitors.

2. Whether attorneys' fees are appropriate under 42 U.S.C. 1988 in an action for declaratory judgment and injunctive relief pursuant to 42 U.S.C. 1983.

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The Questions Are Insubstantial

The Blanket Prohibition Upon Door to Door Solicitation by Nonresidents Has Consistently and Recently Been Held Unconstitutional.

The issue over the constitutionality of a door to door solicitation ordinance has most recently been dealt with by this Court in *Village of Schaumburg* v. *Citizens for a Better Environment,* —— U.S. ——, 63 L. Ed. 73 (1980). This case is indistinguishable with respect to any material fact from *Schaumburg* and from *Martin* v. *City of Struthers,* 319 U.S. 141 (1943).

In the statement of the case in Appellant's jurisdictional statement, there is no mention of the New York state law "trespass" sections of the Penal Law, N.Y. Penal Law §§ 140.05, 140.10 (McKinney 1975), which make it a viola-

tion to enter property which has been posted with signs specifically asking solicitors not to do so. Neither the opinion of the District Court, nor the affirmance by the Second Circuit, nor any position urged at any time by Appellees would deprive a property owner seeking privacy of the right to post her or his property and thus secure all of the benefits of the privacy so dear to the settlers of the Town of Southampton and their descendants. Appellees do not seek to thrust themselves upon unwilling listeners nor to enter upon property which has been barred to such entry by the simple procedure afforded by the New York statute. Similarly, Appellees do wish the opportunity to present their religious message to those householders and residents who do not individually choose to post their property. The rights, not only of the Appellees, but of those non-posting residents would be violated by the position urged by Appellant.

The patent discrimination in the subject ordinance against outsiders creates the suspect class based upon residence condemned by this Court in *Sugarman* v. *Douggal,* 413 U.S. 634 (1973) and *In re Griffith,* 413 U.S. 717 (1973), and inhibits the right of interstate travel, contrary to the principles enunciated by this Court in *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250 (1974) and *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

Appellees do not denigrate the privacy interests of the residents of Southampton, but the argument that Southampton is, by virtue of its history, somehow entitled to interfere with First Amendment rights to a greater extent than other communities is an argument without precedent, which certainly must be rejected in light of the less drastic alternatives, such as posting, available to those who wish to elevate their personal privacy above the First Amendment rights of others.

The essence of the argument of the Appellant is that Southampton is not only special in New York, and therefore not bound by the State legislative policy imposed in the posting-trespass statutes, but unique in the United States and therefore entitled to elevate the privacy considerations of its residents above the First Amendment rights of those residents and visitors who wish peaceably to assemble, communicate, and proselytize their religious philosophies.

Attorneys Fees Were Appropriately Awarded

Appellees sought and secured declaratory and injunctive relief against the attacked ordinance. It is a novel theory, presented for the first time insofar as Appellees are aware, that an action for declaratory and injunctive relief against unconstitutional legislation is not subject to the award of counsel fees because the predicate enactment of the unconstitutional legislation was, obviously, a legislative act. *Supreme Court of Virginia* v. *Consumers Union of the United States,* —— U.S. ——, 64 L. Ed. 641 (1980), does not stand for such a proposition. As a matter of fact, as this Court said in the last paragraph of the opinion in *Consumers Union,* "Fee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a law suit or an injunction." *Consumers Union* differentiates between the enforcement role and the enactment role. Appellant attempts to obscure that distinction.

CONCLUSION

The questions presented are insubstantial, having been addressed and disposed of clearly and explicitly in recent prior determinations by this Court. The judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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SIRS:

PLEASE TAKE NOTICE that the undersigned hereby appears herein as counsel for the Appellees.

Dated: New York, New York
October 3, 1980

Yours, etc.,

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To:

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